Filed 1/22/13 P. v. Marshall CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD MARSHALL,

Defendant and Appellant.

F063597

(Super. Ct. No. BF134279A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Elizabeth M. Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*]Before Wiseman, Acting P.J., Gomes, J. and Poochigian, J.

Appellant Chad Marshall appeals from the judgment entered following his no contest plea to possession of heroin (Health & Saf. Code, § 11350, subd. (a)) and admission of a prior strike conviction. (Pen. Code, § 667, subd. (c)-(j)).[1] In exchange for his plea, the People agreed to dismiss additional charges and enhancements and the court indicated it would impose a four-year term, the two-year midterm doubled.[2] At sentencing, appellant requested a continuance to collect character reference letters. The court denied the request noting, "This is low term two years doubled for four. It's not going to get any better than that." On appeal, Marshall contends the court erred in denying him the opportunity to argue for a lesser sentence because the indicated term was the middle term. He submits the court was unaware of its discretion to impose a lower term than the indicated term. The People respond that the "indicated term" in this case was part of the plea bargain and binding on the court once it approved the plea agreement. As such, there was no good cause for a continuance to further consider the matter of sentencing. We affirm.

FACTS AND PROCEDURAL HISTORY

The police responded to an anonymous citizen complaint of an individual selling drugs in an alley in Bakersfield. Investigating officers found Marshall, who matched the description of the seller, nearby. Officers searched Marshall and found methamphetamine, lorazepam pills, heroin, marijuana, and drug paraphernalia.

Marshall was charged with seven felony and misdemeanor offenses, five prior prison term enhancements (§ 667.5, subd. (b)), and a prior strike conviction. Eventually, he agreed to a prosecution offer to plead no contest to possession of heroin and to admit his prior strike conviction in exchange for "a Court-indicated four years," "Mid term two plus—or times two for four."

---

[1] All further statutory references are to the Penal Code unless noted otherwise.

[2] Marshall states he admitted the five prison term enhancements. The reporter's transcript indicates he did not.

At sentencing, the court denied Marshall's request for a continuance so his family could collect character reference letters. The court noted, "This is low term two years doubled for four. It's not going to get any better than that."

DISCUSSION

Marshall contends the court failed to exercise its discretion at sentencing because it erroneously believed that the indicated sentence was the low term when it was actually the middle term. Thus, there is a strong likelihood the court imposed the middle term due to a mistaken belief that it lacked discretion to impose any lesser sentence. And, because Marshall had a constitutional right to be sentenced by a court that was fully aware of its discretion, the matter should be remanded for sentencing. Marshall's argument rests on the premise that the indicated sentence was not a binding term of the plea agreement. The People respond that despite the court's and the parties' use of the term "indicated" sentence, the four-year term was part of the plea bargain and binding on the court once it approved the plea agreement. We agree with the People's position.

Plea bargaining involves an agreement negotiated by the People and the defendant and approved by the court. The defendant agrees to plead guilty or no contest in order to obtain a reciprocal benefit, usually a less severe punishment than could result if he were convicted of all charges. The more lenient disposition is secured by the prosecutor's consent to the imposition of the lesser punishment or, as happened in this case, the prosecutor's dismissal of some counts in a multicount information. Implicit in the process is the bargaining between the adverse parties to the case—the People and the defendant—which results in an agreement between them. (*People v. Woosley* (2010) 184 Cal.App.4th 1136, 1146.) The trial court has no authority to alter the terms of a lawfully negotiated plea bargain, including the penalty to be imposed, once it has approved the agreement. (*People v. Ames* (1989) 213 Cal.App.3d 1214, 1217-1218.)

In contrast, while the trial court may not negotiate a plea bargain, it may facilitate resolution of a case by providing the defendant an "indicated sentence" if he or she pleads guilty or no contest to all charges and admits all allegations. (*People v. Feyrer*

(2010) 48 Cal.4th 426, 434, fn. 6.) No bargaining is involved because no charges are reduced and the prosecutor's consent is not required. (*People v. Woosley*, *supra*, 184 Cal.App.4th at p. 1146.) When the sentence is "indicated," no guarantee is made. The sentencing court may withdraw from the "indicated sentence" if its factual predicate is disproved. And the defendant retains the right to reject the proposed sentence and go to trial. (*People v. Labora* (2010) 190 Cal.App.4th 907, 915.)

Here, while the record is sparse, the only reasonable inference is that Marshall entered into a bargained-for plea deal in which the prosecutor agreed to dismiss six of seven charges and five prior prison term enhancements in exchange for Marshall's no contest plea to the remaining charges and the specified term. The minutes memorializing the plea agreement state that it was conditioned on Marshall receiving a four-year sentence—the two-year midterm doubled because of the strike prior: "PLEA IS ENTERED ON CONDITION THAT M/T 4 YEARS. (THE ABOVE CONDITION(S) BEING AN INDICATED SENTENCE.)" In addition, the six counts and five allegations were dismissed on the condition the plea remain in effect. Further, there is no indication the prosecutor or the trial court agreed that Marshall could argue for a lesser term. Thus, although the trial court called the four-year term an "indicated" sentence, it was not as that term is used in *People v. Feyrer*, *supra*, 48 Cal.4th at page 434, footnote 6; *People v. Labora*, *supra*, 190 Cal.App.4th at page 915; *People v. Woosley*, *supra*, 184 Cal.App.4th at page 1146; *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516; and *People v. Vessell* (1995) 36 Cal.App.4th 285, 296. Those cases distinguish between an indicated sentence disposition offered and procured by the trial court when the defendant pleads guilty to all charges, and a plea bargain negotiated between the prosecution and the defendant. Marshall's case disposition resulted from a plea bargain with the prosecutor over the charges, not from an indicated sentence when he pled no contest to all charges.

Marshall asserts that the record does not establish the four-year term was bargained for by the parties, because the parties and the court referred to it as "indicated." Had the sentence been a binding part of the plea agreement, it would have been

designated a "stipulated" term or a "lid." We disagree. Under the circumstances apparent in the record, the only reasonable conclusion is that the parties and the court misspoke in referring to the agreed-upon sentence as "indicated." Marshall's case was disposed of by plea bargain, not by indicated sentence. Marshall's argument, in effect, seeks to better his plea agreement. Defendants who agree to a plea deal and have charges dismissed cannot seek to relieve themselves of the agreement's burden. (*People v. Ames*, *supra*, 213 Cal.App.3d at p. 1217.) And the trial court lacked authority to change the plea agreement after approving it. (*Ibid*.) As such, there was no good cause to continue Marshall's sentencing, and the trial court did not err in denying his request to do so.

Further, Marshall has not shown he was prejudiced by the trial judge's misstatement at sentencing that the two-year term was the low term. The court acknowledged the term was the midterm when it took Marshall's plea. And, because the four-year sentence was part of the plea bargain, the court had no authority to impose a lesser sentence.

DISPOSITION

The judgment is affirmed.